IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1977

Docket No. 77-175

JOHN D. STROUP,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The respondent respectfully prays that the petition for writ of certiorari to review the judgment of the Court of Criminal Appeals of Tennessee be denied.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are two in number and can be stated as follows:

1. Whether a state statute requiring a criminal jury to be instructed as to the possibility of parole, and that a defendant's

sentence may be subsequently reduced by serving "good time" and "honor time" is unconstitutional as a violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Whether a state appellate court can apply harmless error in a case where the jury has been instructed about parole, "good time" and "honor time."

STATEMENT OF THE CASE

Pursuant to U. S. Sup. Ct. Rule 40.3, 28 U.S.C.A., respondent submits the following statement of the case as only that deemed necessary in correcting any inaccuracy or omission in the statement of the case set forth in the petition for a writ of certiorari.

The first witness called by the State was Lt. John Talley, a detective with the Memphis Police Department (B.E. 55). From October of 1973 until about August of 1974, Lt. Talley was engaged in a project called "Operation Booker One" wherein his duty was to oversee the work of undercover officers and cooperating individuals who were making bets with certain persons (R. 56-58). Part of this project included an investigation of John Stroup (R. 59). As part of the project, Officer Talley had rented an apartment and had installed several telephones for the sole purpose of placing bets (R. 59). Additionally, sound recording devices were installed so that the telephone conversations could be monitored and recorded (R. 60). In connection with the investigation of John Stroup, Officer Talley observed the making of approximately 15 or 20 tapes of conversations between individuals under his direction and a party answering the telephone at the number registered to John Stroup (R. 61, 62, 65, 66). One of the cooperating individuals in this case was Mr. Harold Richard Halliburton, known to Lt. Talley as

a former barber who had lost large sums of money gambling and agreed to assist the authorities in this case (R. 63, 64).

Mr. Harold Richard Halliburton testified that in October, 1973 he began working for John Talley of the Memphis Police Department and that the work consisted of betting on ball games (R. 71). During the course of his work, he placed bets with a David Looney, approximately 40 or 50 $100 bets, on basketball games (R. 73, 74). Mr. Halliburton also placed bets on basketball games with Robert Singer (R. 75). Also, as a result of a conversation with David Looney on or about April 13, 1974, he telephoned number 358-7958 and talked with a guy named Allen (R. 76). That conversation and other telephone conversations were tape recorded with his consent (R. 77, 78).

Mr. Halliburton identified four tape recordings as his conversations with the guy named Allen wherein he placed bets with a person named Allen (R. 162-198). He testified further that he had bet over the phone on ball games with Dave Looney who had given him Allen's name and telephone number to call to bet baseball (R. 186). He testified that he gambled with a guy named Allen at 358-7958 (R. 196). In response to questions of whether or not he ever exchanged money with Allen, Mr. Halliburton testified that when they first started betting with Looney they were told to settle with Singer so they always settled with Mr. Singer (R. 188).

Jerry S. Bullock, a South Central Bell employee for 20 years, testified that she was custodian of books and records relating to residential accounts (R. 198, 201). She testified that the records reflected that on April 14, 1974, the number 358-7958 was registered to John D. Stroup and no address was contained on the record (R. 201-202).

The next witness was Barry Hale Moore of the Memphis Police Department (R. 205). He testified that beginning in the

last part of 1973 as a member of the vice squad he worked on Operation Booker One (R. 207). As a part of this operation, he worked with a Mr. Halliburton in the investigation of a person known as Allen (R. 208). He testified before the jury that he bet on baseball and basketball games (R. 284). Further, all money transferred were handled with Robert "Bobby" Singer at the direction of Allen during their telephone conversations (R. 293-295). Introduced into evidence were five photographs taken by this witness of a house at 815 Northaven Drive showing a mailbox with the name "Stroup" on it and a Lincoln Continental automobile parked in front (R. 296-301). Moore testified that he made 23 bets with Allen totaling $3,090 and that out of that he won approximately $850 (R. 329). Moore also testified that he had heard Stroup speak in the courtroom the day before his testimony and, upon listening to tape number 16, he testified that a voice on that tape sounded like Stroup (R. 311-331).

David Looney was called as a witness and testified that he had been convicted of professional gambling on February 28, 1975 (R. 302). He testified that beginning in April, 1974 he had accepted bets on basketball games from Harold Halliburton (R. 302, 303). The witness and Robert Singer worked at Firestone Tire & Rubber Company together and had worked together accepting bets and collecting money (R. 302-304). David Looney is the brother-in-law of defendant John D. Stroup and had been for some 30 years (R. 304). The witness called Stroup "Allen" (R. 304, 305). The witness testified that in April or May of 1974 Stroup lived on Northaven (R. 305). The witness also testified that in April or May of 1974 Stroup's phone number was 358-7958 (R. 305). And, the witness testified that he gave Halliburton the telephone number of 358-7958 because Halliburton wanted to bet some baseball and the witness did not handle baseball in his gambling operation (R. 305). The witness identified the State's exhibits which were photographs of a house and identified the house as the defendant's and the

automobile as one looking like defendant's. The witness testified, after listening to Exhibit 4, that one of the voices sounded like Stroup's but he would not swear to it (R. 307).

The first witness for the defense was Robert Singer who, after listening to Exhibit 16 which was played for him by the defense counsel and being asked if he could swear under oath that the exhibit contained the voice of John Stroup, testified as follows:

> I don't know; I ain't going to swear to it; I mean, it does sound like his voice . . . (R. 346).

The next defense witness, James C. "Gene" Weaver testified that he operated an ambulance service which picks up patients not able to walk and carries them to and from their medical appointments (R. 365-367). He testified that his company had taken the defendant from his home at 815 Northaven Drive to and from his doctor's office on April 21, 1974 (R. 369). He testified that he had known the defendant for many years and that his service had taken defendant to medical appointments on other days up to and including May 7, 1974, which was the last date his records reflected (R. 369-371).

The next witness was Harold Demarrero who testified that he was an employer of defendants on several occasions to include June of 1973 when the defendant hurt his back (R. 380-390).

BRIEF

Respondent submits that the decision of the Court of Criminal Appeals of the State of Tennessee in this case is correct and should not be reviewed for the following reasons:

I. Response to Question Presented No. 1.

A. State statutes are presumed not to violate the United States Constitution until proven otherwise.

A decision in favor of petitioner in this case would require that this Court hold Tenn. Code Ann. § 40-2707 to be unconstitutional under the Constitution of the United States. It is an axiom of constitutional law that state statutes are presumed constitutional until proven otherwise. Accordingly, this Court has consistently declined to invalidate statutes because they were merely ill-advised or unwise. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 86 S.Ct. 1254, 1262 (1966); *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 1030-1031 (1963). Respondent contends that Tenn. Code Ann. § 40-2707 is entitled to this presumption regardless of its status under the Tennessee Constitution.

B. Jury instructions on the law of parole and related matters do not constitute a denial of due process of law under the Fourteenth Amendment to the United States Constitution.

Respondent disagrees with petitioner's contention that the complained of jury instructions constituted a denial of due process of law. It is submitted that a defendant's right to fair sentencing is not prejudiced by such instructions. Several state courts have held similar instructions to be permissible. *See,*

e.g. People v. Riser, 47 Cal. 2d 566, 305 P.2d 1, *cert. denied*, 353 U.S. 930, 77 S.Ct. 721 (1956); *Phillips v. State*, 92 So. 2d 627 (Fla. 1957); *State v. Nelson*, 65 N.M. 403, 338 P.2d 301 (1959).

Instructing the jury as to the law of parole can be supported by sound reasoning. In states that vest sentencing power in the jury, it is necessary for the jury to have access to as much information as is constitutionally possible in order to arrive at a fair sentence. It is submitted that, to that end, a state has authority to legislate that the jury be given instructions on parole law and related matters. *Farris v. State*, 535 S.W.2d 608, 617-19 (Tenn. 1976) (two justices dissenting).

Petitioner has set forth two assertions in support of the contention that jury instructions regarding parole, good time, and honor time constitute a denial of due process under the Federal Constitution. Those assertions are the possibility that a jury may impose a greater sentence because the jury knows it could be reduced and that a jury may reach a compromise verdict as to guilt and pass their duty on to a body such as a board of pardons and parole to make a decision about a defendant's worthiness to live in society.

With respect to the second assertion, respondent submits that the question of a compromise verdict as to guilt is not within the question presented to this Court for consideration. The question presented relates only to sentencing. Furthermore, there is no reason to suppose that if a jury believed a defendant to be innocent that they would then convict and sentence the defendant on the basis that a board of pardons and paroles could later determine whether he was worthy to return to society. And, if a compromise verdict had occurred in the instant case, respondent submits that the sentence imposed would have been a minimum sentence, one year in this case, and not double the minimum as imposed by the jury.

With respect to the assertion that juries instructed as in this case may impose a greater sentence because of knowledge that the actual time to be served could be reduced, respondent submits that there is no proof to support this and that it is based on speculation. Additionally, it is submitted that the State has authority to legislate on procedures for sentencing in criminal cases and that no federally protected constitutional right is involved.

Petitioner has also submitted to this Honorable Court that the Supreme Court of Tennessee, in *Farris v. State, supra,* indicated that the complained of instructions constituted a violation of due process. Respondent disagrees and would point out that in the dissenting opinion two justices held the statutory provisions concerned to be constitutional. *Farris v. State,* 535 S.W.2d at 615. A concurring justice agreed that the statutory provision in question was unconstitutional under the Constitution of Tennessee in that the body of the enactment was broader than the caption. *Farris v. State,* 535 S.W.2d at 615. That same concurring justice noted that the statute could also be unconstitutional under the Tennessee Constitution because the legislature had exercised a judicial power. 535 S.W.2d at 615.

The principal opinion in *Farris,* concurred in by one justice, did indicate the complained of instructions constituted a violation of due process. 535 S.W.2d at 614. However, this holding came only after that same opinion held the statutory provision unconstitutional under the Tennessee Constitution because the body of the enactment was broader than the caption. 535 S.W.2d at 610.

C. The controlling statute, Tenn. Code Ann. § 40-2707, has been held unconstitutional under the Constitution of the State of Tennessee by the Tennessee Supreme Court and therefore the issue has been substantially mooted.

The complained of jury instructions were given by the Tennessee trial court in response to the explicit direction of the Tennessee Legislature in Tenn. Code Ann. § 40-2707. This statute required trial courts to instruct juries as to the state law of parole and related matters.

It is submitted that because this statute has been held unconstitutional under the Constitution of the State of Tennessee by the Tennessee Supreme Court in *Farris v. State,* 535 S.W. 2d 608 (Tenn.), *opinion on rehearing, id.* (1976), the issue has been substantially mooted. Although the Tennessee court decided *Farris* on a different issue from that presented to this Court, the effect was to invalidate the statute. The Tennessee court further held that the giving of the complained of instructions in the future would automatically constitute reversible error. *Id.* at 622.

However, the *Farris* holding was not made retroactive. It did not apply to convictions that had become final before the filing of the *Farris* opinion. *Id.* at 614-15. A few cases that had been tried but had not become final, *i.e.,* were still being appealed at the time of *Farris,* were left in limbo. The *Farris* court held that cases falling in this hiatus period were to be dealt with on an ad hoc basis requiring a consideration of the facts of each. *Id.* at 622.

Petitioner's case falls in this hiatus category. Such cases are the only ones that could be affected by this Court's acceptance of the instant petition. Furthermore, most of them have without doubt already been processed in the state courts under the

Farris guidelines, given the fact that *Farris* had decided twenty (20) months ago. *E.g. Adams v. State*, 547 S.W.2d 553 (Tenn. 1977); *Loveday v. State*, 546 S.W.2d 822 (Tenn. Crim. App. 1976). The instant case may well be the only one that would be affected by a decision by this Court in this case.

II. Response to Question Presented No. 2.

A. Even if the complained of jury instruction constituted error, application of a harmless error standard was appropriate.

The question presented by petitioner is whether there can ever be harmless error where a jury is instructed regarding parole, good time, and honor time. Respondent submits that the question must be answered in the affirmative. This Court has at least three times stated a rule for determination of harmless error when confronted with an error of constitutional magnitude. *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

In *Harrington*, the majority stated as follows:

> The case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopt the minority view in *Chapman* . . . that a departure from constitutional procedures should result in an automatic reversal, regardless of the weight of the evidence. 395 U.S. at 254, 89 S.Ct. at 1728.

A dissent in *Harrington* by Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Marshall, expressed the belief that the majority had overruled *Chapman* by considering the

issue of the substantiality of the evidence and not the effect on the jury's decision caused by the tainted evidence. 395 U.S. at 256, 89 S.Ct. at 1729.

Based upon these authorities, respondent submits that application of a harmless error standard in the instant case is appropriate. This is particularly so because the question presented relates only to sentencing.

B. The Court of Criminal Appeals of Tennessee correctly held the alleged error in the instant case to be harmless.

In this case the Tennessee Court of Criminal Appeals, following the Tennessee Supreme Court's holding in *Farris*, presumed that the complained of jury instructions constituted error. Taking the ad hoc approach mandated by *Farris*, the court nevertheless affirmed petitioner's conviction, finding that the error was harmless. *Stroup v. State* (A. 6).

The facts, as set forth in the Statement of the Case hereinbefore, support the lower court's finding of harmlessness. The evidence against petitioner was great and was contradicted only by the testimony of an accomplice. The petitioner did not testify. The jury, having found petitioner guilty, could have sentenced him to a maximum of five (5) years in prison and a one thousand dollar ($1,000) fine. Instead it sentenced him to only two (2) years imprisonment. Therefore, petitioner's claim that the jury instructions influenced the jury to impose a heavy sentence is contradicted by the facts.

The Tennessee Supreme Court, which was surely sensitive to this issue after its holding in *Farris*, approved the holding of the Court of Criminal Appeals that such error was harmless in the instant case by "(f)inding no error" and denying certiorari (A. 1).

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that the petition for a writ of certiorari should be denied.*

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Certiorari has been forwarded to Mr. William R. Willis, Attorney at Law, 700 Union, Nashville, Tennessee 37219, this 25th day of October, 1977.

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* Acknowledgment is made to Mr. William P. Sizer, an August graduate of the University of Tennessee College of Law employed in the Office of the Attorney General of Tennessee as a law clerk, for research and assistance in preparation of this Brief.